63

Supreme Court, U.S.
FILED
AUG 6 - 2007
OFFICE OF THE CLERK

No. 07-07-154

IN THE
# Supreme Court of the United States

VIVENDI, S.A.,

*Petitioner,*

v.

OLIVIER GERARD, GERARD MOREL, WILLIAM CAVANAGH, RETIREMENT SYSTEM FOR GENERAL EMPLOYEES OF THE CITY OF MIAMI BEACH, and BRUCE DONIGER, INDIVIDUALLY AND, AS CLASS REPRESENTATIVES, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

PAUL C. SAUNDERS
*Counsel of Record*

DANIEL SLIFKIN
TIMOTHY G. CAMERON
TEENA-ANN V. SANKOORIKAL
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000

*Counsel for Petitioner*

August 6, 2007

## QUESTION PRESENTED FOR REVIEW

Can absent foreign claimants who may not be precluded by a judgment or settlement in a U.S. class action from suing the same defendants again in foreign jurisdictions properly be included in a class certified under Rule 23 of the Federal Rules of Civil Procedure?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner is Vivendi, S.A., a French company, who was the defendant-petitioner below and shall be referred to as "petitioner" or "Vivendi" throughout this petition. Prior to April 20, 2006, Vivendi, S.A. was known as Vivendi Universal, S.A. (the named corporate defendant in the district court litigation, captioned *In re Vivendi Universal, S.A. Securities Litigation*, No. 02 Civ. 5571 (RJH/HBP) (S.D.N.Y.)). The other defendants at the district court level are Jean-Marie Messier (Vivendi's former Chief Executive Officer) and Guillaume Hannezo (Vivendi's former Chief Financial Officer). Vivendi, S.A. is a publicly held corporation with no parent company. No publicly held corporation owns 10 percent or more of Vivendi, S.A.'s stock.

By Memorandum Opinion and Order entered March 26, 2007 (subsequently corrected by a Revised Memorandum Opinion and Order entered May 24, 2007), the United States District Court for the Southern District of New York certified a plaintiff class in *In re Vivendi Universal, S.A. Securities Litigation*, No. 02 Civ. 5571 (RJH/HBP) (S.D.N.Y.), consisting of all persons from the United States, France, England and the Netherlands who purchased or otherwise acquired ordinary shares or American Depository Shares of Vivendi Universal, S.A. between October 30, 2000, and August 14, 2002. Respondents Olivier Gérard, a French resident, Gérard Morel, a French resident, William Cavanagh, a United States resident, Retirement System for General Employees of the City of Miami Beach, a United States pension fund, and Bruce Doniger, a United States resident, were appointed as class representatives.

On April 9, 2007, Vivendi filed a Petition in the United States Court of Appeals for the Second Circuit pursuant to Fed. R. Civ. P. 23(f) seeking leave to appeal from the district Court's Memorandum Opinion and Order on class certification (No. 07-1463-mv). By Order filed May 8, 2007, the United States Court of Appeals for the Second Circuit denied Vivendi's petition, thereby sanctioning the district court's Memorandum Opinion and Order on class certification.[1]

---

[1] The district court order also denied a motion by plaintiff Capital Invest, Die Kapitalanlagesellschaft Der Bank Austria Creitanstalt Gruppe GMBH ("Capital Invest") to be appointed a class representative, thereby excluding them from the class in this action. Capital Invest also filed a Rule 23(f) petition before the United States Court of Appeals for the Second Circuit (No. 07-1419-mv) with respect to that ruling. In addition, co-defendants Jean-Marie Messier and Guillaume Hannezo also filed separate petitions (Nos. 07-1468-mv and 07-1465-mv, respectively), seeking leave to appeal the district court's order concerning class certification. The Order of the Second Circuit filed May 8, 2007, denied those three petitions as well. As stated more fully herein, Vivendi seeks the issuance of a writ of certiorari to review the district court decision granting class certification, which was effectively sanctioned by Second Circuit's denial of its Rule 23(f) petition. The only parties to that petition were Vivendi and the appointed class representatives; therefore, Capital Invest and Messrs Messier and Hannezo are not parties hereto within the meaning of Sup. Ct. R. 14.1 (b).

## TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ..... i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES ..... ii

TABLE OF AUTHORITIES ..... vii

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

RULE INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

Introduction ..... 3

Statement of Facts and the District Court's Revised Memorandum Opinion and Order on Class Certification ..... 5

The Order of the United States Court of Appeals for the Second Circuit, filed May 8, 2007, Denying Vivendi's Petition Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure for Leave to Appeal from the District Court's Memorandum Opinion and Order ..... 9

**Page**

REASONS FOR GRANTING THE WRIT ..... 10

I. The Court Should Grant Certiorari To Clear Up Fundamental Confusion Within the Second Circuit and Across the Nation as to the Relationship Between the Requirement of Res Judicata and the Determination of Class Action "Superiority" Under Rule 23(b)(3) of the Federal Rules of Civil Procedure. ..... 10

A. There is Fundamental Confusion in the Second Circuit as to the Relationship Between the Requirement of Res Judicata and the Determination of Class Action "Superiority" Under Rule 23(b)(3). ..... 11

B. There is Fundamental Confusion Across the Nation as to the Relationship Between the Requirement of Res Judicata and the Determination of Class Action "Superiority" Under Rule 23(b)(3). ..... 14

C. There is an Acute Need for the Supreme Court To Provide Guidance to Lower Courts as to the Relationship Between the Requirement of Res Judicata and the Determination of Class Action "Superiority" Under Rule 23(b)(3)..... 17

II. The District Court's Divergent "More Likely Than Not" Test, Which the Second Circuit Effectively Sanctioned, Is Contrary to the Fundamental Requirement of Res Judicata/Claim Preclusion That Underlies Rule 23 Class Actions. ..... 19

A. The New Test Betrays a Double Standard to the Detriment of Foreign Corporations and in Violation of Due Process..... 20

**Page**

B. The New Test is Inconsistent with the Mandatory Notice Requirements of Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure. ..... 21

C. The New Test Creates an Incentive for "Game-Playing" in Foreign Jurisdictions in Violation of Due Process. ..... 22

D. In Circumstances When There Has Been an Erroneous Application of the New Test, There Is No Recourse for a Class Action Defendant Sued in a Foreign Jurisdiction After the End of Class Action Litigation. ..... 23

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Am. Pipe & Constr. Co.*, 414 U.S. 538 (1974).....19, 20, 23

*Ansari v. New York University*, 179 F.R.D. 112 (S.D.N.Y. 1998).....12

*Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975).....3, 11

*Casper v. Cunard Line, Ltd.*, 560 F. Supp. 240 (D.C. Pa. 1983).....14, 16

*CL-Alexanders Laing & Cruikshank v. Goldfeld*, 127 F.R.D. 454 (S.D.N.Y. 1989).....13

*Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984).....19, 20, 22

*Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113 (S.D.N.Y. 2001).....12, 14, 17

*Frietsch v. Refco, Inc.*, No. 92 C 6844, 1994 U.S. Dist. LEXIS 312 (N.D. Ill. Jan 12, 1994).....15, 16

*GAMCO Investors, Inc. v. Vivendi Universal, S.A.*, No. 03 Civ. 5911 (RJH/HBP) (S.D.N.Y.).....6

*In re Activision Sec. Litig.*, 621 F. Supp. 415 (N.D. Cal. 1985).....14, 17

*In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348 (S.D.N.Y. 2002).....13

*In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291 (D. Del. 2003).....15, 16

**Page(s)**

*In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 1998 WL 50211 (S.D.N.Y. Feb. 6, 1998) ..... 13

*In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981) ..... 21

*In re Telectronics Pacing Systems, Inc.*, No. MDL-1057, 1996 U.S. Dist. LEXIS 11088 (S.D. Ohio Feb. 22, 1996) ..... 14, 15, 16, 17

*In re Turkcell Iletisim Hizmetler A.S. Sec. Litig.*, 209 F.R.D. 353 (S.D.N.Y. 2002) ..... 13

*In re U.S. Financial Securities Litigation*, 69 F.R.D. 24 (S.D. Cal. 1975) ..... 16, 17

*In re Vivendi Universal, S.A. Securities Litigation*, No. 02 Civ. 5571 (RJH/HBP) (S.D.N.Y.) ..... ii, 2, 6

*Jordan v. Global National Resources, Inc.*, 104 F.R.D. 447 (S.D. Ohio 1984) ..... 16, 17

*Liberty Media Corp. v. Vivendi Universal, S.A.*, No. 03 Civ. 2175 (RJH/HBP) (S.D.N.Y) ..... 6

*Quaak v. KPMG*, 361 F.3d 11 (1st Cir. 2004) ..... 18

*Takeda v. Turbodyne Tech., Inc.*, 67 F. Supp. 2d 1129 (C.D. Cal. 1999) ..... 14, 17

*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) ..... 5

**Statutes & Rules**

15 U.S.C. § 77a ..... 6

15 U.S.C. § 78a ..... 6

15 U.S.C. § 78j(b) ..... 6

**Page(s)**

17 C.F.R. § 240.10b-5 ..... 6

28 U.S.C. § 1254(1) (2000) ..... 2

28 U.S.C. § 2072 (2000) ..... 3

Fed. R. Civ. P. 23 ..... passim

French *Code Civil, art.* 2270-1 ..... 23

Sup. Ct. R. 13.1 ..... 2

Sup. Ct. R. 14.1 (b) ..... iii

**Other Authorities**

Andrew Longstreth, *Coming to America When Can Foreign Investors Who Bought Shares of Foreign Companies on Foreign Exchanges Sue in the U.S.? Billions of Dollars in Settlements and Attorneys' Fees Can Hang on the Answer*, Am. Law., Nov. 2006 ..... 18

Charles Alan Wright, et al., *Federal Practice & Procedure*, § 4455 (2007) ..... 19, 20

Institutional Shareholder Services, *Accountability Goes Global: International Investors and U.S. Securities Class Actions* (2007), http://www.issproxy.com/pdf/accountability goesglobal.pdf ..... 18

James Wm. Moore et al., *Moore's Federal Practice* ¶ 23.104(2)(a)(v) (3d ed. 2006) ..... 22

Mary Jacoby, *Courting Abroad: For the Tort Bar, A New Client Base: European Investors*, Wall St. J., Sept. 2, 2005 ..... 18

**Page(s)**

Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 37 Tort & Ins. L.J. 999 (2002).....18

No. 07-

IN THE

# Supreme Court of the United States

VIVENDI, S.A.,

*Petitioner,*

v.

OLIVIER GERARD, GERARD MOREL, WILLIAM CAVANAGH, RETIREMENT SYSTEM FOR GENERAL EMPLOYEES OF THE CITY OF MIAMI BEACH, and BRUCE DONIGER, INDIVIDUALLY AND, AS CLASS REPRESENTATIVES, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

Petitioner Vivendi, S.A. (sued in the district court as Vivendi Universal, S.A.) (hereinafter "Vivendi") respectfully prays that a writ of certiorari issue to review the Memorandum Opinion and Order on class certification of the United States District Court for the Southern District of New York, entered on March 26, 2007 (as subsequently corrected by a Revised Memorandum Opinion and Order, entered on May 24, 2007), which was effectively sanctioned by Order of the United States Court of Appeals for the Second Circuit, filed May 8, 2007, denying Vivendi's petition for leave to pursue an interlocutory appeal of the

district court's class certification order pursuant to Rule 23(f) of the Federal Rules of Civil Procedure.

## OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit, filed May 8, 2007, denying Vivendi's petition pursuant to Rule 23(f) of the Federal Rules of Civil Procedure for leave to appeal from the district court's class certification order, is unreported and is annexed as Appendix A. That Order effectively sanctioned the Memorandum Opinion and Order on class certification of the United States District Court for the Southern District of New York entered in *In re Vivendi Universal, S.A. Securities Litigation*, No. 02 Civ. 5571 (RJH/HBP) (S.D.N.Y.). The district court's Revised Memorandum Opinion and Order, entered May 24, 2007, which corrected a typographical error in the original Memorandum Opinion and Order, is reported at 241 F.R.D. 213 (S.D.N.Y. 2007) and is annexed as Appendix B. The district court's original Memorandum Opinion and Order, entered on March 26, 2007, is unreported and is annexed as Appendix C.

## JURISDICTION

The United States Court of Appeals for the Second Circuit filed its Order on May 8, 2007, denying Vivendi's petition pursuant to Rule 23(f) of the Federal Rules of Civil Procedure for leave to appeal from the district court's class certification order. This petition is timely filed within ninety days of that Order. Sup. Ct. R. 13.1. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1) (2000).

## RULE INVOLVED

The question presented in this case concerns Rule 23(b)(3) of the Federal Rules of Civil Procedure,

promulgated pursuant to 28 U.S.C. § 2072 (2000). That Rule is reproduced and annexed as Appendix D.

## STATEMENT OF THE CASE

### Introduction

Vivendi seeks review in order to clarify whether, if a judgment or settlement in a U.S. class action may not be given res judicata effect against foreign class members, class plaintiffs can nonetheless satisfy the "superiority" requirement for class certification set forth in Rule 23(b)(3) of the Federal Rules of Civil Procedure. That is a pressing legal question with tremendous significance not only to the instant case, but to the growing number of securities class actions in the U.S. involving foreign plaintiffs, many of whom have distinct rights of suit against the same defendant in their own countries.

The law in this area is in disarray. Courts across the nation have developed divergent and irreconcilable tests for determining whether foreign shareholders should be excluded from a class in circumstances where, if the class action lawsuit is dismissed, taken to judgment, or settled, defendants would not be able to assert claim preclusion to bar subsequent actions by those foreign shareholders in foreign jurisdictions where they reside, contrary to the requirement of res judicata.

In *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), the Second Circuit held that absent French shareholders could not be included in a Rule 23(b)(3) opt-out class because, among other reasons, it was a "near certainty" that a foreign court would not recognize an eventual judgment in the U.S. action. *Id.* at 996. In the instant case, however, Judge Richard J. Holwell of the United States District Court for the Southern District of New York has departed from that precedent and created a novel and

unlawful test for "superiority" under Rule 23(b)(3) that leaves the law in shambles. Contrary to the principles of res judicata and due process that underlie all class action jurisprudence, Judge Holwell erroneously determined that a class could nonetheless be certified if the plaintiffs could show only that the U.S. judgment in this case would "more likely than not" be given preclusive effect in foreign jurisdictions. (5/24/07 Revised Mem. Op. & Order, *see, e.g.*, P. App. B-36, B-51, B-54, B-62.) *Bersch*, the 32-year-old decision by the Second Circuit, now effectively has been reversed by one of its own district courts.

The instant case represents only the latest of many departures from *Bersch*. Other lower courts, both within the Second Circuit and across the nation, have devised a variety of divergent and irreconcilable tests for when properly to include in a U.S. class action, under U.S. securities laws, the absent foreign purchasers of foreign securities, on foreign exchanges.

The Second Circuit, by sanctioning the district court's novel decision in this case, has left an increasingly crucial area of federal law devoid of any consistent standard or guidance. There are no other Court of Appeals decisions other than *Bersch* on point, and this petition raises a question of first impression for the Court. The stakes are enormous. (For example, in the instant case, Vivendi's total number of outstanding securities during the class period was approximately 1.08 billion, of which approximately 75 percent were held by absent foreign purchasers. (*See* 5/24/07 Revised Mem. Op. & Order, P. App. B-5.) The damages sought on behalf of those foreign purchasers now included in the class, as a result of the district court's decision, will inevitably be significant.)

Without Supreme Court guidance, different lower courts across the nation facing precisely the same issue –

namely, what to do when confronted by a lack of claim preclusion in foreign courts as against shareholder plaintiff class members – will continue to reach diametrically different results, with no appellate guidance whatsoever. As the Court noted recently, "[p]rivate securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law". *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007), (*citing Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006)). That observation, and that risk of abuse, is equally pertinent to the instant situation of district courts certifying classes that include foreign plaintiffs who are not precluded from suing the same defendants again, for the same alleged conduct, in foreign jurisdictions.

**Statement of Facts and the District Court's Revised Memorandum Opinion and Order on Class Certification**

Vivendi is a French corporation with its principal place of business in France. (*See* 5/24/07 Revised Mem. Op. & Order, P. App. B-5.) Throughout the relevant period, Vivendi's "ordinary shares – traded predominantly on the Paris Bourse – were held by persons or entities outside the United States, predominantly in France and the rest of Europe." (*Id.*) Only its American Depository Shares ("ADSs"), representing less than 25 percent of its equity, and owned in large part by non-class members (the Bronfman family), were traded in the United States. (*Id.*)

Commencing on July 18, 2002, a combined total of sixteen separate putative class action suits were filed against Vivendi, Jean-Marie Messier (Vivendi's former CEO) and (in nine cases) Guillaume Hannezo (Vivendi's former CFO) in the United States District Court for the Southern District of New York and in the United States District Court for the Central District of California. On September 30, 2002, Judge

Harold J. Baer of the United States District Court for the Southern District of New York ordered the consolidation of the fourteen New York cases into *In re Vivendi Universal, S.A. Securities Litigation* No. 02 Civ. 5571 (RJH/HBP) (S.D.N.Y). On November 4, 2002, the United States District Court for the Central District of California approved the transfer of the two cases filed in California to New York, to be consolidated with *In re Vivendi Universal, S.A. Securities Litigation* No. 02 Civ. 5911 (RJH/HBP) (S.D.N.Y).[2]

On January 7, 2003, respondents filed a consolidated class action complaint against Vivendi and Messrs. Messier and Hannezo, alleging violations of Sections 11 and 12(a) of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, and Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. Respondents' Securities Act allegations relate to allegedly false and misleading statements or omissions in an October 30, 2000, Form F-4 Registration Statement and Prospectus issued prior to the December 8, 2000, merger among Vivendi, Canal Plus, S.A. and The Seagram Company Ltd. Respondents' Exchange Act allegations relate to allegedly false or misleading statements or omissions in certain of Vivendi's public statements between October 30, 2000, and August 14, 2002. Respondents' Section 14(a) claim was dismissed with prejudice on April 1, 2004.

---

[2] Two individual actions filed in the United States District Court for the Southern District of New York, *Liberty Media Corp. v. Vivendi Universal, S.A.*, No. 03 Civ. 2175 (RJH/HBP) (S.D.N.Y), filed March 28, 2003, and *GAMCO Investors, Inc. v. Vivendi Universal, S.A.*, No. 03 Civ. 5911 (RJH/HBP) (S.D.N.Y), filed August 6, 2003, have been consolidated with the present case for pre-trial purposes.

On October 20, 2004, respondents filed their Notice of Motion for Class Certification (P. App. K), and Memorandum of Law in Support thereof (P. App. L). Following the subsequent withdrawal of several proposed class representatives, respondents filed a Notice of Substituted Motion for Class Certification (P. App. M), and Memorandum of Law in Support thereof (P. App. N), on July 15, 2005. Respondents sought certification by the district court of a worldwide class consisting of all persons worldwide who purchased or otherwise acquired Vivendi's common stock or ADSs during the proposed class period: October 30, 2000, to August 14, 2002. (P. App. N-12.)

Petitioner filed and served its Memorandum in Opposition to Plaintiffs' Substituted Motion for Class Certification on October 5, 2005. (P. App. O.) The primary argument raised by Petitioner in opposition to class certification was that foreign shareholders must be excluded from the class because Vivendi would not be able to assert claim preclusion to bar subsequent actions against it in the European countries in which those foreign investors reside. (P. App. O-15 ("[T]he claims of foreign holders of Vivendi common stock (or ADSs) cannot be resolved through a Rule 23 opt-out class action because the French courts (and those of other European countries) will not give preclusive effect to any judgment by this Court.").) In support of that res judicata argument, Petitioner filed twelve expert declarations to demonstrate that foreign courts across Europe would not, as a near certainty – the *Bersch* standard – recognize a U.S. class action judgment to preclude a subsequent claim. (P. App. O.) One of those declarations was submitted by a former judge of France's highest court, the *Cour de Cassation*, confirming that a judgment or settlement in a U.S. "opt-out" class action would not be recognized or enforced in France. (P. App. O-30.) In addition, Petitioner also informed the district court of several pending suits against Vivendi in France, including a French

action on behalf of a "class" of identified shareholder plaintiffs, alleging claims virtually identical to those at issue in the United States. (P. App. O-32 -33.)

Respondents filed their Reply Memorandum in Further Support of Their Substituted Motion for Class Certification on December 21, 2005 (P. App. P), together with expert declarations in response. On February 6, 2006, Petitioner filed its Sur-Reply Memorandum of Law in Further Opposition to Plaintiffs' Substituted Motion for Class Certification (P. App. Q), together with two expert declarations that further confirmed, *inter alia*, that the legal systems of France and other European countries "would not hold their citizens bound by a decision rendered by an American court" (*see* P. App. Q 10-11).

Respondents subsequently filed another expert declaration on June 26, 2006, to which Petitioner responded with a further expert declaration on July 10, 2006. Respondents filed a further expert declaration on July 17, 2006. Oral argument on class certification occurred before Judge Holwell on July 18, 2006. (P. App. R.)

As stated in the Revised Memorandum Opinion and Order on class certification entered on May 24, 2007, the district court certified a class "consisting of all persons from the United States, France, England, and the Netherlands who purchased or otherwise acquired ordinary shares or [ADSs] of Vivendi" between October 30, 2000, and August 14, 2002. (5/24/07 Revised Mem. Op. & Order, P. App. B-67.) The district court held that because the courts in England, France and the Netherlands would "more likely than not" grant preclusive effect to a judgment in a securities fraud class action against a French corporation, purchasers of common shares who lived in those countries and bought stock on foreign exchanges could be included in a class under Rule 23. (*Id.*, P. App. B-62.)

The "more likely than not" standard that the district court devised is a departure from all previous jurisprudence in this area either in the Second Circuit or across the nation. Not only does it diverge from the accepted and usual course of judicial proceedings regarding class certification under Rule 23(b)(3), but it raises real risks for a defendant, such as Petitioner, faced with a class comprised mostly of foreign shareholders who may be able to sue again in one or more overseas jurisdictions. At its essence, the district court has replaced the *Bersch* test with another based on nothing more than a judicial guess as to whether those foreign claimants will, or will not, sue again overseas. The consequences of the district court getting that guess wrong, as here, are enormous – Petitioner, for example, is now faced with a sizeable class, roughly 75 percent of which is not precluded from suing Vivendi twice in a foreign jurisdiction. Indeed, as noted above, some foreign class members already are suing Vivendi overseas – several individual shareholder lawsuits, premised upon the same allegations at issue in the instant case, have already been filed against Vivendi in France. (*See* P. App. O-32-33.) Following class certification, Petitioner has no remedy whatsoever to protect itself against duplicative suits by class members in foreign jurisdictions.

**The Order of the United States Court of Appeals for the Second Circuit, filed May 8, 2007, Denying Vivendi's Petition Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure for Leave to Appeal from the District Court's Memorandum Opinion and Order**

On May 8, 2007, the United States Court of Appeals for the Second Circuit entered its Order denying Vivendi's Petition Pursuant to Fed. R. Civ. P. 23(f) for Leave to Appeal from the District Court's Memorandum Opinion and Order on class certification. (P. App. A.) In the one-sentence order, the Second Circuit declined to review the district court's decision, despite the fact that the only court of

appeals decision on the same issue – its own – reached the opposite conclusion.

## REASONS FOR GRANTING THE WRIT

The Court should address and clarify whether, if a judgment or settlement in a U.S. class action may not be given res judicata effect against foreign class members, class plaintiffs can nonetheless satisfy the "superiority" requirement for class certification set forth in Rule 23(b)(3) of the Federal Rules of Civil Procedure. The district court's divergent "more likely than not" standard for analyzing the likelihood of claim preclusion as against foreign class members, which the Second Circuit sanctioned by refusing to review the instant case, violates long-established res judicata principles and due process procedures. Moreover, unless corrected, the district court's decision will exacerbate the significant disagreement and confusion that exists both within the Second Circuit and in other jurisdictions across the nation concerning the role res judicata plays in judicial class certification determinations involving foreign shareholders and the "superiority" analysis required by Rule 23(b)(3) of the Federal Rules of Civil Procedure. The instant case presents an unique opportunity for the Court to address those crucial questions.

### I. The Court Should Grant Certiorari To Clear Up Fundamental Confusion Within the Second Circuit and Across the Nation as to the Relationship Between the Requirement of Res Judicata and the Determination of Class Action "Superiority" Under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

District courts across the nation have addressed in a variety of inconsistent ways the question of whether, if a judgment or settlement in a U.S. class action may not be given res judicata effect against foreign class members, class

plaintiffs can nonetheless satisfy the "superiority" requirement for class certification set forth in Rule 23(b)(3) of the Federal Rules of Civil Procedure. As a result, there is now a real need for guidance and clarification on that question from the Supreme Court. Whatever the standard, U.S. litigants should be able to know what test is going to be applied by the courts in certifying putative classes that include foreign persons.

### A. There is Fundamental Confusion in the Second Circuit as to the Relationship Between the Requirement of Res Judicata and the Determination of Class Action "Superiority" Under Rule 23(b)(3).

Within the Second Circuit – where many of these cases arise – courts are plainly confused as to the relationship between the requirement of res judicata and the determination of class action "superiority" under Rule 23(b)(3). The lower courts seem to agree that res judicata is an element of the superiority requirement – a fact acknowledged by the district court, *see* 5/24/07 Revised Mem. Op. & Order, P. App. B-35 – but they clearly disagree on whether superiority can be established under Rule 23(b)(3) if res judicata or subsequent claim preclusion with respect to all members of the class cannot be guaranteed. That is a compelling legal question that warrants the Court's attention and requires immediate resolution.

In *Bersch*, Judge Henry Friendly wrote for the Second Circuit Court of Appeals that absent French shareholders could not be included in a Rule 23(b)(3) opt-out class because, among other reasons, it was a "near certainty" that a foreign court would not recognize an eventual judgment in the U.S. action. *Bersch*, 519 F.2d at 996.

Despite the fact that that holding is (or was) the law, the lower courts in the Second Circuit have not always followed

that ruling, and the district court in the instant case essentially overruled it. As the district court itself observed, in the thirty years "[s]ince *Bersch*, and without the benefit of any further guidance from the Second Circuit", district courts have approached that same superiority determination under Rule 23(b)(3), in cases involving absent foreign claimants, "in a somewhat haphazard way". (5/24/07 Revised Mem. Op. & Order, P. App. B-32.) That fact is immediately obvious from consideration of the Second Circuit cases addressing the relationship between the requirement of res judicata and the determination of class action "superiority" under Rule 23(b)(3), which follow at least three markedly divergent approaches to that issue.

In *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113 (S.D.N.Y. 2001), the district court crafted a 'sliding scale' of likelihood of preclusion. Recognizing "a distinction . . . between those circumstances in which there is a 'possibility' that a foreign court may not recognize a judgment, and those in which there is 'near certainty' that it will not be recognized", the district court found that the defendants had demonstrated, at most, "a possibility" that a judgment in their favor would have no res judicata effect abroad, as opposed to a "near certainty". *Id.*, at 134-35. That was not enough to exclude foreign shareholders from the proposed class.

Other district courts, although citing *Bersch* with approval, have failed to articulate or apply any explicit test, but seem to have required defendants to reach some threshold below the *Bersch* "near certainty" standard. Most notably, in *Ansari v. New York University*, 179 F.R.D. 112 (S.D.N.Y. 1998), the court held that lack of preclusive effect was established because "what limited case law there is on this issue *suggests* that at least six of the prospective class members are residents of countries" that do not give a U.S. judgment preclusive effect. *Id.*, at 117 (emphasis added). The court likewise did not require a finding of "near

certainty" in *CL-Alexanders Laing & Cruikshank v. Goldfeld*, 127 F.R.D. 454 (S.D.N.Y. 1989), but nevertheless found that the foreign law in question "would not afford defendants res judicata protection against class members in an 'opt-out' kind of class". *Id.*, at 455; *see also In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 364 (S.D.N.Y. 2002).

Yet other district courts in the Second Circuit have applied a standard that eschews both of those decisions and is even more burdensome on defendants than *Bersch*'s "near certainty" test. In *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 1998 WL 50211 (S.D.N.Y. Feb. 6, 1998), the court held that because defendants' affidavits did not "compel the conclusion that a judgment in the United States would have no value in a foreign court" and observing that "a foreign court may look to the results achieved [in the United States] for guidance", held that the superiority requirement of Rule 23(b)(3) was satisfied. *Id.*, 1998 WL 50211, at *15. This very high "no value" standard has since been adopted by at least one other court in the Second Circuit. *See In re Turkcell Iletisim Hizmetler A.S. Sec. Litig.*, 209 F.R.D. 353, 360 (S.D.N.Y. 2002) (Buchwald, J.) ("[W]e cannot conclude that a Turkish court would give no weight to a judgment of this court.").

Against the background of those cases, the district court's decision in the instant case has now added yet another test, different again, for reconciling a potential lack of claim preclusion as against certain foreign class members, with the superiority requirement of Rule 23(b)(3) – namely, the "more likely than not" test. (*See* 5/24/07 Revised Mem. Op. & Order, P. App. B-36.) The existence of what is now four different approaches to this issue in the Second Circuit alone shows why guidance from the Supreme Court is so urgently needed with respect to this issue.

### B. There is Fundamental Confusion Across the Nation as to the Relationship Between the Requirement of Res Judicata and the Determination of Class Action "Superiority" Under Rule 23(b)(3).

There is also confusion between circuits as to the relationship between the requirement of res judicata and the determination of class action "superiority" under Rule 23(b)(3). No other appeals court has addressed that issue, and while many district courts outside of the Second Circuit have referred to *Bersch* for guidance, they too have reached vastly divergent results.

Like *Cromer*, 205 F.R.D. 113, several non-Second Circuit decisions have utilized a sliding scale to draw a distinction between defendants who establish the "possibility" that a foreign court may not recognize a judgment, and those that can establish 'near certainty'. In *Casper v. Cunard Line, Ltd.*, 560 F. Supp. 240 (D.C. Pa. 1983), the district court found that foreign national passengers could not be excluded from a class because the defendant cruise line had only demonstrated a "possibility", and not a "near certainty", that a foreign court would not "recognize and enforce" the judgment of a U.S. court. *Id.* at 243; *see also Takeda v. Turbodyne Tech., Inc.*, 67 F. Supp. 2d 1129, 1138 n.19 (C.D. Cal. 1999) (refusing to exclude foreign shareholders from a class in a securities fraud class action litigation against a corporation that designed and manufactured products to enhance performance and reduce emissions of internal combustion engines); *In re Activision Sec. Litig.*, 621 F. Supp. 415, 432 (N.D. Cal. 1985) (certifying foreign shareholders as part of a class in securities litigation related to the public offering of securities of Activision, a company that manufactured, and marketed video game cartridges). Utilizing the same type of analysis, but at the other end of the scale, the court in *In re*

*Telectronics Pacing Systems, Inc.*, No. MDL-1057, 1996 U.S. Dist. LEXIS 11088 (S.D. Ohio Feb. 22, 1996), found that, because the defendants had submitted uncontradicted affidavits that showed that the U.S. court's judgment would have no preclusive effect in several foreign jurisdictions, and in light of the fact that in some foreign jurisdictions "similar actions had already begun", the defendant had met the "near certainty" test of *Bersch*. *Id.*, 1996 U.S. Dist. LEXIS 11088, at *3-*5.

*In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291 (D. Del. 2003), follows the *Ansari* approach of citing *Bersch* approvingly, failing to apply any explicit test, but seemingly requiring the defendant to reach some threshold below "near certainty". *In re DaimlerChrysler* was a securities class action litigation in which plaintiffs alleged that the defendant car manufacturers misled investors into approving a merger. 216 F.R.D. at 294. According to the court, all the defendants had to do was "contend that there is a significant likelihood that foreign courts will not recognize and enforce a United States judgment" in order for the court to exclude all foreign investors from the class. *Id.* at 301 ("[I]n the Court's view, the appropriate way in which to address the concerns related to foreign investors is not to deny class certification, but to certify a class comprising only domestic investors.").

The district court in *Frietsch v. Refco, Inc.*, No. 92 C 6844, 1994 U.S. Dist. LEXIS 312, *30 (N.D. Ill. Jan 12, 1994), adopted yet another, divergent approach to this issue that seemed to require the defendant to demonstrate, as a matter of certainty, that claim preclusion would not exist in a foreign jurisdiction, before the foreign plaintiffs would be excluded from the class. *Friestch* was a securities fraud class action against a brokerage company. 1994 U.S. Dist. LEXIS 312, at *30. In that case, the district court refused to exclude foreign shareholders from the class because defendant did not know, and had not shown, "for a fact" that foreign courts

would not give full res judicata effect to a judgment or settlement in the U.S. class action. *Id.*, at *30-*31 ("The court has seen no affidavit that makes clear the fact that a German court would not give res judicata effect to any decision arrived at in this case.").

Other courts have deviated entirely from *Bersch* to devise new tests to determine whether a potential lack of claim preclusion with respect to foreign claimants nonetheless means plaintiffs can establish the superiority requirement of Rule 23(b)(3). For example, in *Jordan v. Global National Resources, Inc.*, 104 F.R.D. 447 (S.D. Ohio 1984), the court required the defendant to show "a *substantial probability* of subsequent foreign suits and consequent enforcement of adverse judgments against assets held abroad", as a threshold requirement for excluding foreign plaintiffs from a proposed class. *Id.*, at 448 (emphasis added); *see also In re U.S. Financial Securities Litigation*, 69 F.R.D. 24, 53 (S.D. Cal. 1975).

As the preceding discussion demonstrates, there is no consistency or consensus in courts across the nation as to how a lack of claim preclusion as against foreign class members in a foreign jurisdiction should be treated for purposes of class certification, and, in particular, for purposes of the superiority analysis required by Rule 23(b)(3). Indeed, not only is there a lack of uniformity across the circuits, but, like in the Second Circuit, there is a lack of consistency within the circuits as well. For example, as described above, the district court in *In re DaimlerChrysler*, 216 F.R.D. at 301, utilized a different test for purposes of Rule 23(b)(3) than that applied by the court in *Casper*, 560 F. Supp. at 243, even though both cases were pending in the Third Circuit. Likewise, despite the fact that *In re Telectronics Pacing Systems*, 1996 U.S. Dist. LEXIS 11088, and *Global National Resources*, were both cases from the Southern District of Ohio, they each applied different standards in addressing that

issue, as well. *Telectronics* utilized the *Cromer* concept of a sliding scale of foreign claim preclusion, *see* 1996 U.S. Dist. LEXIS 11088, at *3-*5, while *Global National Resources* utilized a different threshold test, premised upon whether or not a defendant could show a "substantial probability" of a subsequent suit overseas, *see* 104 F.R.D. at 448. The same confusion and lack of a consistent standard is also evident in cases in the Ninth Circuit: while *In re Activision*, 621 F. Supp. at 432, and *Takeda*, 67 F. Supp. 2d at 1138, each applied the sliding scale analysis utilized also in *Cromer*, 205 F.R.D. at 134-35, the analysis in *In re U.S. Financial Securities Litigation*, 69 F.R.D. at 53, was premised upon the very different "substantial probability" test utilized in *Global National Resources*, 104 F.R.D. at 448.

Given such confusion, and the failure of the federal appeals courts to provide any guidance post-*Bersch*, there is a now a critical need for the Supreme Court to address, and resolve, the question here presented – namely, can absent foreign claimants who may not be precluded by a judgment or settlement in a U.S. class action from suing the same defendants again in foreign jurisdictions properly be included in a class certified under Rule 23 of the Federal Rules of Civil Procedure?

### C. There is an Acute Need for the Supreme Court To Provide Guidance to Lower Courts as to the Relationship Between the Requirement of Res Judicata and the Determination of Class Action "Superiority" Under Rule 23(b)(3).

The compelling legal question presented here is of fundamental importance to the development of the law of class actions. Unless reviewed by the Court, the district court's erroneous decision, and the Second Circuit's inexplicable decision not to review it, threaten to encourage courts to certify foreign shareholders as part of a class even

when there is a significant chance that a judgment will have no preclusive effect on foreign courts, leading to double recovery. That likelihood is only magnified in "an increasingly global economy" where courts are facing those issues with more and more frequency. *See Quaak v. KPMG*, 361 F.3d 11, 19 (1st Cir. 2004).[3]

Few securities fraud class actions are ever tried or appealed on the merits and even when they are, the

---

[3] As explained in detail in the Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of the Petition of Vivendi, S.A. for Leave to Appeal Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, dated April 17, 2007, as filed before the United States Court of Appeals for the Second Circuit (P. App. H), the number of cases in which foreign investors that bought a foreign company's securities on foreign exchanges are seeking recovery in the United States is skyrocketing. *See* Andrew Longstreth, *Coming to America When Can Foreign Investors Who Bought Shares of Foreign Companies on Foreign Exchanges Sue in the U.S.? Billions of Dollars in Settlements and Attorneys' Fees Can Hang on the Answer*, Am. Law., Nov. 2006. (P. App. S.) U.S. plaintiffs' firms actively are recruiting foreign investors to be lead plaintiffs in securities class action cases. *Id.* The number of securities class action lawsuits filed in U.S. courts against foreign issuers has increased dramatically in the last five years. *See* Mary Jacoby, *Courting Abroad: For the Tort Bar, A New Client Base: European Investors*, Wall St. J., Sept. 2, 2005, at A1. Plaintiffs' firms have been aggressively seeking to file U.S. class actions on behalf of absent foreign claimants, in what "threatens [to be] a barrage of forum shopping by litigants and counsel who seek to create transnational class actions". Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 37 Tort & Ins. L.J. 999, 1001 (2002). (P. App. U.) Foreign shareholders are increasingly becoming actively involved in U.S. securities class action litigation. *See* Institutional Shareholder Services, *Accountability Goes Global: International Investors and U.S. Securities Class Actions* (2007), http://www.issproxy.com/pdf/accountabilitygoesglobal.pdf (P. App. V-5 (reporting 182 different instances of an international institutional investor seeking to serve as a lead plaintiff in a U.S. securities class action from 1996 through March 31, 2007)).

appropriateness of the class is rarely an issue. Further, the appellate courts have been inexplicably silent on the foreign claim preclusion issue and have permitted confusion to spread throughout the country, so that class certification hearings now apply a variety of standards and are entirely unpredictable. Thus, it is highly unlikely that any court will consider the important question presented here unless the Court addresses it. If the Court does not consider the issue now, the real likelihood is that it will never have the opportunity to correct the fundamental error committed by the courts below and the error will be repeated again and again.

## II. The District Court's Divergent "More Likely Than Not" Test, Which the Second Circuit Effectively Sanctioned, Is Contrary to the Fundamental Requirement of Res Judicata/Claim Preclusion That Underlies Rule 23 Class Actions.

Claim preclusion with respect to all members of a certified class for subsequent claims premised upon the same allegations is a fundamental element of Rule 23 class actions. As the Court has held, "[t]here is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation". *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).[4] Indeed, "[t]he central purpose of each of the various forms of class action is to establish a judgment that will bind not only the representative parties but also all nonparticipating members of the class certified by the court". Charles Alan

---

[4] *See also Am. Pipe & Constr. Co.*, 414 U.S. 538, 547 (1974) ("[I]t was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.").

Wright, et al., *Federal Practice & Procedure*, § 4455 (2007).[5]

Contrary to that fundamental requirement, the district court has held that foreign claimants can be included in a class, and the "superiority" requirement of Rule 23(b)(3) can be met, even though claim preclusion is not certain or even nearly certain (*see* P. App. B-36), and the Second Circuit has sanctioned that holding (P. App. A). According to the district court, all that is required is that claim preclusion be "more likely than not". (P. App. B-36.) That unprecedented test requires nothing more than for a court make a guess as to whether those foreign claimants will, or will not, sue again overseas. Not only is such a test unworkable in practice, but it is at odds with due process.

### A. The New Test Betrays a Double Standard to the Detriment of Foreign Corporations and in Violation of Due Process.

Application of a "more likely than not" test raises fundamental due process concerns. A U.S. corporate defendant sued in a class action where all members of the class are U.S. residents will receive the benefit of complete claim preclusion. *See Cooper*, 467 U.S. at 874. In sharp contrast, and as the district court concedes, a foreign defendant (such as Petitioner), facing a class comprised

---

[5] Rule 23 was specifically amended in 1966 to eliminate so-called "spurious" opt-in class actions because they were potentially non-binding on plaintiffs. Opt-in class actions permitted class members "to intervene after a decision on the merits favorable to their interests . . . although they would presumably be unaffected by an unfavorable decision." Fed. R. Civ. P. 23 advisory committee's note (1966) (P. App. D-21). Shortly thereafter, the Supreme Court made clear that "[t]he 1966 amendments were designed, in part, specifically to . . . assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments". *Am. Pipe* 414 U.S. at 547.

mostly of foreign purchasers (here, close to 75 percent of the class (*see* P. App. B-5)), receives only minimal protection from subsequent claims, despite receiving the same judgment or settlement in the U.S. action.

Under the district court's new test, a class including absent foreign class members could still be certified even if there were only a 51 percent chance of preclusion. In such circumstances, the district court's failure to afford a foreign defendant (such as Vivendi) the full level of protection to which it is entitled under U.S. law upon class certification – namely complete claim preclusion – is a due process violation. *See In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) (*vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982)) ("Certainly the principle of res judicata, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is a part of the process that is due under our constitutional system.").[6]

### B. The New Test is Inconsistent with the Mandatory Notice Requirements of Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure.

Because it reduces the preclusive effect of a class action judgment to a matter of probabilities, the district court's test is inconsistent with the mandatory notice requirements of Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure.

---

[6] Certifying a class including absent foreign class members, where subsequent claims are only "more likely than not" barred in foreign jurisdictions, also "sacrific[es] procedural fairness" considerations that are at the heart of the superiority analysis under Rule 23(b)(3). *See* Fed. R. Civ. P. 23 advisory committee's note (1966) (P. App. D-16). That is particularly so in this case, where the district court has certified a class in circumstances where claim preclusion will as a certainty exist only for far less than 25 percent of the class. (*See* P. App. B-5.)

That Rule requires that notice to class members "concisely and clearly state in plain, easily understood language . . . the *binding effect of a class judgment on class members* under Rule 23(c)(3)". Fed. R. Civ. P. 23(c)(2)(B) (emphasis added). The "binding effect" to which the Rule refers is, of course, complete subsequent claim preclusion and res judicata protection for the defendant following a class action judgment. *See Cooper*, 467 U.S. at 874. Indeed, the entire purpose of that Rule is to inform potential class members of what they give up by choosing not to stay in the class rather than to opt out. *See* 5 James Wm. Moore et al., *Moore's Federal Practice* ¶ 23.104(2)(a)(v) (3d ed. 2006) ("A Rule 23(c)(2) notice must inform the class members that, if they do not exercise their right to opt out, they will be bound by any judgment rendered in the class action."). Unless claim preclusion is absolute, however, that notice, and that Rule, is meaningless. No such notice can be given in the instant case because complete subsequent claim preclusion cannot be guaranteed. (*See* P. App. B-51 ("[A] judgment in this case would, *more likely than not*, be granted recognition [in France].") (Emphasis added).) Thus, the district court's test requires, for the first time, the certification of a class to which the literal requirements of Rule 23 cannot be met.

### C. The New Test Creates an Incentive for "Game-Playing" in Foreign Jurisdictions in Violation of Due Process.

By allowing for the possibility that a class will be certified that includes absent foreign purchasers whose claims overseas will not subsequently be barred, the district court's test creates an incentive for foreign claimants and their plaintiffs' counsel to "play games" in order to maximize their recovery. Like plaintiffs in the now-discredited "spurious" opt-in class actions (P. App. D-9), foreign claimants can simply wait until the litigation has concluded, and any appeal period has expired, before determining

whether to participate in any judgment or settlement. If Vivendi wins, the foreign shareholders can file individual suits in France, England or the Netherlands and try again (with the advantage of the factual record developed in the U.S. litigation as a road map). Otherwise, if there is a judgment – litigated or by settlement – against Vivendi, the foreign shareholders will then be able to decide whether they like that recovery or think they can get a higher (or supplemental) recovery through individual suits in their home countries.

That concern is not hypothetical. There are already several shareholder suits pending against Vivendi in France (*see* P. App. B-29, O-32-33), and given the ten-year statute of limitations in France for fraud against a corporation, French *Code Civil*, *art.* 2270-1, foreign purchasers could wait until their claims have been fully adjudicated in a U.S. court before even filing a foreign claim. (P. App. O-32.) That scenario is just the kind of "second bite at the apple" that Rule 23 was amended to eliminate in 1966. *See Am. Pipe*, 414 U.S. at 547 ("A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await . . . final judgment on the merits in order to determine whether participation would be favorable to their interests."); *see also* P. App. D.

### D. In Circumstances When There Has Been an Erroneous Application of the New Test, There Is No Recourse for a Class Action Defendant Sued in a Foreign Jurisdiction After the End of Class Action Litigation.

If subsequent suits are, in fact, brought in foreign jurisdictions after the end of the litigation, there is no recourse in the U.S. at that point for a class action defendant, even if the district court's certification of the U.S. class, based on the new "more likely than not" standard, proves

erroneous. A defendant cannot, following a final judgment, return to a U.S. court for redress. Instead, it would be forced to relitigate the merits of the action in the foreign jurisdiction or to settle (again) with the absent foreign claimant. That result is fundamentally inconsistent with the intended operation of the U.S. class action mechanism and Rule 23.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit.

August 6, 2007.

Respectfully Submitted,

PAUL C. SAUNDERS
*Counsel of Record*

DANIEL SLIFKIN
TIMOTHY G. CAMERON
TEENA-ANN V. SANKOORIKAL
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000

*Counsel for Petitioner*